United Nations A/HRC/WGAD/2018/40

General Assembly

Distr.: General
17 September 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

Opinion No. 40/2018 concerning Jeong-in Shin and Seung-hyeon Baek (Republic of Korea)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 9 May 2018 the Working Group transmitted to the Government of the Republic of Korea a communication concerning Jeong-in Shin and Seung-hyeon Baek. The Government replied to the communication on 9 July 2018. The Republic of Korea is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

* In accordance with paragraph 5 of the Working Group's methods of work, Seong-Phil Hong did not participate in the discussion of the present opinion.

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. The case presented by the source concerns two individuals who have each been sentenced to terms of imprisonment because of their refusal to undertake military service in the Republic of Korea.

Detention of Jeong-in Shin

5. Jeong-in Shin is a 23-year-old Korean citizen who usually resides in Gyeonggi-do, Republic of Korea. Mr. Shin is a Jehovah's Witness and a conscientious objector to military service. He was indicted for evading military service by refusing to enlist on 22 December 2015. The source states that the legal basis for the detention was article 88 (1) of the Military Service Act.

6. The source provided a copy of the trial judgment delivered by the Bucheon Branch of Incheon District Court on 9 June 2016. The judgment acknowledged that Mr. Shin had been a devout Jehovah's Witness since he was very young. The trial judge also recalled that Jehovah's Witnesses do not participate in secular political activities, but remain strictly neutral. In addition, the trial judge found that members of that faith believed that they should not cause harm to or use weapons against others, and that they refused to perform military duty or engage in any form of war.

7. According to the trial judgment, Mr. Shin pleaded in his defence that he could not act against his faith and conscience. However, he also informed the Court that, instead of undertaking military duty, he was willing to perform alternative service or serve the community in a manner that was not related to the military. The trial judge considered that the duty of national defence was not limited to those who actually joined the military, and could be undertaken in other ways. It was for the legislature to define the scope of active service duty, and to determine what constituted alternative service. Moreover, the trial judge found that "justifiable grounds" for refusing to perform military duty under article 88 (1) of the Military Service Act should not be interpreted in a manner that violated the fundamental right to freedom of conscience.

8. As a result, the trial judge determined that Mr. Shin's sincere religious beliefs and conscience were a "justifiable ground" for not performing military service, and that his situation fell within the freedom of conscience guaranteed by article 19 of the Constitution. On that basis, the Court found that Mr. Shin was not guilty.

9. The source reports that the decision in favour of Mr. Shin was overturned on appeal. In its appeal judgment of 3 February 2017, Incheon District Court considered that the freedom to exercise one's conscience must be a relative freedom and could be limited. The Court found that the freedom of conscience was not superior to the constitutional duties of military service and national defence, the purpose of which was to ensure the dignity and value of all citizens. The restriction on Mr. Shin's freedom of conscience was justified by article 37 (2) of the Constitution. Moreover, the Court considered that the absence of alternative service should not be considered as a violation of article 18 of the Covenant. Mr. Shin was sentenced to 18 months' imprisonment. The Supreme Court subsequently upheld the decision of Incheon District Court on 15 June 2017.

10. On 21 June 2017, Mr. Shin was arrested and imprisoned at the Incheon Detention Centre. According to Mr. Shin's certificate of detention, he is due to complete his sentence on 20 December 2018. He has now been in detention for more than 14 months.

Detention of Seung-hyeon Baek

11. Seung-hyeon Baek is a 21-year-old Korean citizen who usually resides in Gyeonggi-do. Mr. Baek is also a Jehovah's Witness and conscientious objector to military service. Mr. Baek was indicted for evading military service by refusing to enlist on 13 November 2017.

12. The source reports that the Yeoju Branch of Suwon District Court sentenced Mr. Baek to 18 months' imprisonment on 4 April 2018. The source provided a copy of the trial judgment, which noted that, even though United Nations human rights institutions had adopted resolutions recognizing the right to conscientious objection to military service based on article 18 of the Covenant, such resolutions were not directly binding on the Republic of Korea. In addition, the Court considered that there was no customary international law concerning the protection of the right to conscientious objection to military service. Accordingly, the Court did not accept Mr. Baek's claim that a right to refuse to perform military service for reasons of conscience should be recognized under the Constitution and the Covenant. Furthermore, the Court considered that there was no current exemption for reasons of religious faith provided in law and no provision for alternative service under the Military Service Act. In view of the discretion given to the legislature under the Constitution, the Court could not interpret a "justifiable ground" under the Military Service Act as including the act of refusing to perform military service for reasons of religious conscience.

13. Suwon District Court ordered that Mr. Baek's sentence commence with immediate effect. The source submits that the trial judge's decision to detain Mr. Baek immediately at the Court is a rare and harsh order concerning a conscientious objector, and was unheard of in the Republic of Korea during the previous 10 years. Mr. Baek has appealed the decision of Suwon District Court. His criminal case has not been finalized and the appeal is currently pending.

14. According to Mr. Baek's certificate of detention, he was initially detained at Yeoju Prison. He was then transferred to Suwon Detention Centre on 13 April 2018, where he awaits his appeal hearing. He has now been in detention for more than four months.

15. The source emphasizes that the Court's decision to detain Mr. Baek is contrary to recent positive developments in the Republic of Korea. For example, the source notes that just one day after Mr. Baek's sentencing and detention, another trial court rendered a decision of not guilty in relation to a conscientious objector who had refused to undertake military service on the same grounds as Mr. Baek.

16. The source reports that, between May 2015 and 19 April 2018, trial and appellate courts rendered 78 decisions finding conscientious objectors not guilty. In addition, as of December 2017, 687 cases involving conscientious objectors were pending before the courts, while the lower courts await a ruling by the Constitutional Court on the right to refuse to perform military service. The source notes that, despite numerous recommendations from the international community, as well as undeniable evidence that imprisoning conscientious objectors constitutes arbitrary detention, the Government continues to criminalize conscientious objection to military service. As of January 2018, 309 people were incarcerated for this reason. Over the past 70 years, more than 19,300 conscientious objectors have been imprisoned for exercising their freedom of conscience in the Republic of Korea.

Category II: exercise of fundamental rights

17. The source submits that the basis of the conscientious objection of Mr. Shin and Mr. Baek is their strict adherence to sincerely held religious beliefs. The source recalls that the right to conscientious objection to military service is protected by the Covenant, and that this protection has been recognized by both the Working Group on Arbitrary Detention and the Human Rights Committee.

18. In particular, the source submits that the Covenant recognizes that the right to conscientious objection to military service inheres in the right to freedom of conscience under article 18 (1) of the Covenant. The source also points out that imprisonment for the

legitimate exercise of rights constitutes arbitrary detention under article 9 (5) of the Covenant. The source refers to a report published in May 2017 by the Office of the United Nations High Commissioner for Human Rights, which states that States must ensure that no one is detained arbitrarily, particularly in indiscriminate round-ups with the aim of identifying young persons who have failed to resolve their military status. States should release individuals who are imprisoned or detained solely on the basis of their conscientious objection to military service.[1]

19. Accordingly, the source considers that the detention of Mr. Shin and Mr. Baek is arbitrary. Their situation falls within category II because they are detained as a result of the exercise of their freedom of conscience guaranteed by article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.

Response from the Government

20. On 9 May 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 9 July 2018 about the current situation of Mr. Shin and Mr. Baek. The Working Group also requested the Government to clarify the legal provisions justifying their continued detention, as well as its compatibility with the obligations of the Republic of Korea under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of the two individuals.

21. The Government submitted its response on 9 July 2018. In its response, the Government confirms that Mr. Shin and Mr. Baek were imprisoned at a detention centre after being convicted under article 88 (1) of the Military Service Act. This provision stipulates that any person who "fails to enlist in the military or to comply with the call even after three days from the date of enlistment or call without justifiable grounds" shall be punished.

22. According to the Working Group's methods of work, the deprivation of liberty as a result of the exercise of the rights or freedoms guaranteed by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant is deemed arbitrary under category II. The Government submits that this does not apply to the case of Mr. Shin and Mr. Baek, as their imprisonment amounts to a justifiable limitation on the freedom to manifest one's religion or beliefs in conformity with the requirements of article 18 (3) of the Covenant.

23. The Government indicates that, since 2006, it has explored ways of implementing an alternative to military service with a view to promoting human rights. However, the long-standing military tension on the Korean Peninsula necessitates the maintenance of military power of considerable size and the universal imposition of compulsory military service to safeguard national security. These circumstances led the Government to continue to uphold sanctions against conscientious objectors as a necessary and justifiable restriction pursuant to article 18 (3) of the Covenant.

24. In addition, the Government notes that, in its previous jurisprudence, the Working Group found that the right of conscientious objection is protected by article 18 (1) of the Covenant as a "manifestation" of one's religion, which may be subject to limitation under article 18 (3) of the Covenant (see opinion No. 16/2008, para. 36). The Government refers to a similar finding by the Human Rights Committee in 2007, in which the Committee found a claim of conscientious objection to military service to be a protected form of manifestation of religious belief under article 18 (1), and clarified that restrictions on conscientious objectors, such as conviction and sentence, must be justified by the permissible limits outlined in article 18 (3) (see CCPR/C/88/D/1321-1322/2004).

25. The Government acknowledges that the Human Rights Committee, in its Views on communications submitted on behalf of 100 conscientious objectors in the Republic of Korea in 2011 (CCPR/C/101/D/1642-1741/2007), assumed that the right of conscientious objection inhered in the right to freedom of thought, conscience and religion guaranteed by

[1] See A/HRC/35/4, para. 65.

article 18 (1) of the Covenant and must not be impaired by coercion. Accordingly, the Committee found that punishment for the refusal to be drafted for military service on the grounds of conscience or religious belief was a violation of the Covenant, with no need to invoke article 18 (3). The Committee has subsequently maintained its stance in similar cases.

26. However, the Government reiterates its view that the conscientious objection to military service constitutes an act of explicitly manifesting one's religion or beliefs. Therefore, the exercise of the right must be subject to the limitations prescribed in article 18 (3) of the Covenant. According to the Government, the Covenant differentiates between freedom of conscience that is non-derogable from one that may be subject to limitations. That is, article 18 distinguishes freedom to have or to adopt a religion or belief from freedom to manifest one's religion or belief in worship, observance, practice and teaching, the latter being subject to restrictions under article 18 (3). The Government recalls that the Human Rights Committee also acknowledged this distinction in its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion.

27. The Government also points out that the Human Rights Committee has not provided a definition of "conscience", nor has it clarified the scope of legitimate limitation of the freedom to manifest one's conscience under article 18 (3) of the Covenant. Given that the dictionary definition of the term "manifest" is "to show something clearly, through signs or actions", conscientious objection to military service and refusing enlistment amounts to the explicit "manifestation" of one's conscience. Moreover, the Government argues that interpreting conscientious objection as an absolute right that "inheres in the right to freedom of thought, conscience and religion" may result in a de facto invalidation of article 18 (3) of the Covenant.

28. In addition, the Human Rights Committee has stated in a recent communication (see CCPR/C/112/D/2179/2012, para. 7.3) that it considers that the claim of conscientious objection may be differentiated from the refusal to pay taxes or the refusal of mandatory education because, unlike schooling or payment of taxes, military service implicates individuals in a self-evident level of complicity with a risk of depriving others of life.[1] According to the Government, such complicity may be a reason for more meticulous consideration of proportionality and the necessity of limitations prescribed in article 18 (3) of the Covenant, but cannot be a ground for concluding that clear and explicit expression of refusal to perform military service is not a "manifestation" of a belief.

29. The Government submits that the criminal punishment of conscientious objectors based on the Constitution and the Military Service Act fulfils a justifiable restriction necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others as defined in article 18 (3) of the Covenant. Mr. Shin and Mr. Baek were sentenced to imprisonment based on article 39 of the Constitution, which provides that all citizens shall have the duty of national defence. The detention of both individuals was the result of a fair trial by an independent judiciary concluding that a conscientious refusal to be enlisted in the military did not fall within the purview of the justifiable grounds referred to in the Military Service Act. It is, therefore, clear that the criminal punishment of Mr. Shin and Mr. Baek is a limitation based on legitimate legal grounds.

30. According to the Government, the detention of Mr. Shin and Mr. Baek is necessary to protect public safety and the fundamental rights and freedoms of others. The Government recalls the statement of the Human Rights Committee in its general comment No. 22 that restrictions on the freedom of conscience must be necessary and proportionate (see para. 8). In the present case, the Government submits that criminal sanctions against conscientious objectors are inevitable and legitimate restrictions in the light of the unique security situation on the Korean Peninsula.

31. The military service system of the Republic of Korea is based on conscription and the Government has an obligation to operate the system in a fair and equitable manner.

[1] In that case, the Government had argued that that the claim of conscientious objection could be extended in order to justify acts such as a refusal to pay taxes or refusal of mandatory education.

Active duty soldiers reside inside a military unit and their fundamental rights, such as the right to liberty or to privacy, are limited. To avoid these burdens, some citizens commit illegal acts by renouncing their nationality or manipulating medical records for the purpose of evading military service. This underlines the need for a fair and equal imposition of military service.

32. According to the Government, courts in the Republic of Korea generally sentence conscientious objectors to 18 months' imprisonment. A minimum of 18 months in prison is required to prevent conscientious objectors from being subject to a further notice of enlistment. As a result, Mr. Shin and Mr. Baek were sentenced to 18 months' imprisonment. By comparison, active duty soldiers spend between 21 and 23 months in military service. If one compares the length of service and the length of imprisonment, as well as the similar limitations on one's right to movement, and taking into account the possibility of parole, a sentence of 18 months' imprisonment for conscientious objectors cannot be considered an extraordinarily punitive punishment that violates the principle of proportionality. The Government therefore submits that the detention of Mr. Shin and Mr. Baek was not arbitrary.

33. While the Government maintains criminal sanctions against conscientious objectors, it has been engaged since 2006 in continuous efforts to review the introduction of alternative military service through public hearings, polling and research. Nevertheless, there has been no change in the Government's position that the punishment of conscientious objectors pursuant to article 88 (1) of the Military Service Act must be maintained for the sake of public safety.

34. Finally, the Government notes that the Constitutional Court ruled on 25 June 2018 that article 5 (1) of the Military Service Act is unconstitutional because it violates the freedom of conscience by not specifying alternative military service for conscientious objectors. At the same time, the Constitutional Court ruled that article 88 (1) of the Military Service Act, which allows for the imprisonment of conscientious objections, is not unconstitutional. Following this decision, the National Assembly is required to amend the law to adopt alternative service by 31 December 2019. Building on its previous research and findings, the Government will endeavour to secure social consensus regarding reasonable alternatives to military service in the near future. The Constitutional Court ordered temporary application of the existing provisions until the due date to amend the law. The Government seeks the Working Group's understanding of the fact that the current system will need to be maintained until the law is amended.

Further comments from the source

35. On 10 July 2018, the Government's response was sent to the source for further comment. The source responded on 24 July 2018 and noted that, in opinion No. 43/2017, the Working Group had concluded that the detention of a conscientious objector was arbitrary and violated articles 9, 18 and 26 of the Covenant. The source requests the Working Group to make a similar finding in the present case.

36. In addition, the source recalls that the Human Rights Committee has repeatedly emphasized that the Covenant must be interpreted as a living instrument that reflects the progress of international human rights law, including the evolution of the right to conscientious objection to military service. Although this right was not initially recognized, in its resolution 1989/59, the Commission on Human Rights recognized conscientious objection as a legitimate exercise of the right to freedom of thought, conscience and religion guaranteed by article 18 of the Covenant. In its general comment No. 22, the Human Rights Committee took a step further, finding that that right could be derived from article 18 of the Covenant. In 2011, the Committee found in the case of *Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007) that the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. Accordingly, the source submits that there is no doubt that article 18 of the Covenant is now regarded as including the right to conscientious objection to military service.

37. The source refers to subsequent jurisprudence of the Human Rights Committee, including the case of *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008). In that case, the Committee reiterated that the right to conscientious objection to military service was inherent in article 18 (1) of the Covenant and not a mere manifestation of religion. The source also refers to 16 separate cases considered by the Human Rights Committee from the Republic of Korea, Turkey and Turkmenistan in which it determined that the right to conscientious objection to military service is protected under article 18 (1) of the Covenant. The source argues with reference to these cases that, if the restriction of the right to conscientious objection due to national security concerns is a legitimate act, as the Government claims, the purpose of article 18 (1) of the Covenant would be defeated.

38. In addition, the source notes that in its general comment No. 22, the Human Rights Committee stated that article 18 (3) of the Covenant should be strictly interpreted to prevent infringement of the rights protected in article 18 (see para. 8). The source points out that, contrary to the Government's claims, national security is not included as a permissible limitation in article 18 (3) and therefore cannot be a basis to limit the freedom of conscience. Furthermore, in its general comment No. 22, the Committee states that, since the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief, the right to conscientious objection can be derived from article 18 (para. 11). However, the Government, through its own interpretation of the comment, attempts to justify the criminal punishment and detention of Mr. Shin and Mr. Baek.

39. The source acknowledges that the Constitutional Court rendered a landmark decision on 28 June 2018 ruling that article 5 (1) of the Military Service Act was unconstitutional because of its omission of alternative service for conscientious objectors. The source recalls that, although the Court ruled that article 88 (1) of the Act was constitutional, six of the nine justices expressed the view that the provision must be maintained to punish military service evaders, not conscientious objectors, and that punishing conscientious objectors in the absence of alternative service was unconstitutional.

40. Finally, the source recalls that the Government became a State party to the Covenant in 1990, and in the years between 1993 and 2003 participated in a total of seven resolutions of the Commission on Human Rights and Human Rights Council that recognize conscientious objection to military service as a "right". Therefore, the Government is obliged to respect the Covenant and the resolutions of the Commission and Council.

Discussion

41. The Working Group thanks the source and the Government for their submissions.

42. In determining whether the deprivation of liberty of Mr. Shin and Mr. Baek is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

43. This case concerns the right to conscientious objection to perform military service. It is, therefore, appropriate to briefly restate the principles relating to the freedom of conscience, drawing upon the considerable body of legal analysis and jurisprudence developed by the Working Group, the Human Rights Committee and other human rights mechanisms.

(a) In its annual report for 2000, the Working Group recommended that all States adopt appropriate legislative or other measures to ensure that conscientious objector status is recognized and attributed (see E/CN.4/2001/14, paras. 91–94). Until such measures have been adopted, the prosecution of conscientious objectors should not give rise to more than

one conviction, so as to prevent the judicial system from being used to force individuals to change their beliefs;[3]

(b) In its jurisprudence and following its country visits, the Working Group has reiterated that conscientious objection derives from the right to freedom of thought, conscience and religion protected under article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.[4] In its earlier jurisprudence, the Working Group stated that it considered conscientious objection to military service to be a manifestation of one's conscience (see, for example, opinion No. 16/2008). However, the approach of the Working Group has evolved over time to embrace a more progressive approach that expands the scope of human rights, and reflects a growing consensus regarding the harm to society involved in obliging individuals to take up arms and to take part in a military process involving training in the use of force despite their convictions. The Working Group has, most recently, treated the detention of a conscientious objector as a violation per se of article 18 (1) of the Covenant (see opinion No. 43/2017);

(c) In its general comment No. 22, the Human Rights Committee stated that, while the Covenant does not explicitly refer to a right to conscientious objection, such a right can be derived from article 18, inasmuch as the obligation of an individual to use lethal force within a military institution might seriously conflict with the freedom of conscience and the right to manifest one's religion or belief (para. 11). In 2011, the Committee stated, in the case of *Jeong et al. v. Republic of Korea*, that the right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs (paras. 7.2–7.4).[5] The Committee also found that a State may compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. Alternative service must not be punitive, it must be a real service to the community, and compatible with respect for human rights (para. 7.3). The case of Min-Kyu Jeong represented a departure by the majority of the Committee from its previous jurisprudence. A majority of the Committee now treats the right to conscientious objection to military service as part of the absolutely protected right to hold a belief under article 18 (1) of the Covenant, which cannot be restricted by States.[6] The Working Group strongly agrees with and fully embraces this approach;

(d) The Human Rights Council, and before that the Commission on Human Rights, have recognized the right to conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion under article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.[7] The Human Rights Council has emphasized that States should refrain from imprisoning individuals solely on the basis of their conscientious objection to military service, and should release those that have been so imprisoned.[8]

44. Applying the above principles to the present case, it is clear that the deprivation of liberty of Mr. Shin and Mr. Back is the direct result of their genuinely held religious and conscientious beliefs as Jehovah's Witnesses in refusing to enlist in military service. Accordingly, the Working Group finds that the detention of Mr. Shin and Mr. Back violates

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[3] The possibility of being placed in double jeopardy does not apply to either Mr. Shin or Mr. Back. As the Government noted in its response, the courts referred to the determination of Mr. Shin and Mr. Back to refuse to perform military service, and sentenced both defendants to the minimum punishment (18 months' imprisonment) necessary to exempt them from future military service.

[4] See, for example, opinions No. 43/2017, No. 16/2008, No. 8/2008 and No. 24/2003. See also A/HRC/16/47/Add.3, para. 68, and A/HRC/10/21/Add.3, para. 66.

[5] However, see *Jung et al. v. Republic of Korea* (CCPR/C/98/D/1593-1603/2007) and *Yoon and Choi v. Republic of Korea* (CCPR/C/88/D/1321-1322/2004).

[6] See *Kim et al. v. Republic of Korea* (CCPR/C/112/D/2179/2012). Several members of the Committee provided dissenting views on this point.

[7] See, for example, Human Rights Council resolutions 36/18, 24/17 and 20/2, and Commission on Human Rights resolutions 2004/35, 2002/45, 2000/34, 1998/77, 1995/83, 1993/84, 1991/65 and 1989/59.

[8] See Human Rights Council resolution 24/17, paras. 10 and 11.

the absolutely protected right to hold or adopt a religion or belief under article 18 of the Universal Declaration of Human Rights and article 18 (1) of the Covenant. Unlike the manifestation of religious belief, this absolutely protected right to hold or adopt a religion or belief is not subject to limitation under article 18 (3) of the Covenant. In the view of the Working Group, there can be no limitation or possible justification under the Covenant for forcing a person to perform military service, as to do so would completely undermine the right to freedom of thought, conscience and religion in article 18 (1) of the Covenant.[9] The Working Group does not accept the Government's argument that this interpretation may result in a de facto invalidation of article 18 (3) of the Covenant. That provision still applies to various forms of manifestation of religion or belief. Moreover, other forms of conscientious objection that do not involve military service may be determined in future as being subject to limitation under article 18 (3).[10]

45. The Working Group concludes that the deprivation of liberty of Mr. Shin and Mr. Baek is arbitrary under category II, and also falls within category I as it lacks legal basis.

46. The Working Group takes note that there is currently no alternative civilian service in the Republic of Korea to accommodate the beliefs of conscientious objectors, but that the Government is undertaking consultations on the development of such service in the light of the recent ruling of the Constitutional Court. The Working Group urges the Government to adopt appropriate measures as a matter of urgency to exempt conscientious objectors from military service or to provide a non-punitive alternative compatible with respect for human rights.

47. Furthermore, as the Working Group has already noted, Mr. Shin and Mr. Baek were deprived of their liberty because of their position of conscience and beliefs as Jehovah's Witnesses. Mr. Baek received particularly harsh treatment compared to other conscientious objectors because, unlike others in a similar position, he was detained by court order with immediate effect. Moreover, the day after Mr. Baek's sentencing, a conscientious objector in a similar situation was found not guilty by another trial court. The Government did not address these allegations in its submission. Accordingly, the Working Group finds that Mr. Shin and Mr. Baek were deprived of their liberty on discriminatory grounds due to their religion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Their deprivation of liberty is arbitrary according to category V. The Working Group refers this case to the Special Rapporteur on freedom of religion or belief.

48. In addition to the Working Group's findings, there is widespread concern in the international community about the deprivation of liberty of conscientious objectors in the Republic of Korea. That concern is reflected in the recommendations made in the December 2017 report of the Working Group on the Universal Periodic Review on the Republic of Korea (A/HRC/37/11). Those recommendations included the decriminalization of conscientious objection to military service, the release of conscientious objectors and the introduction of a civilian alternative to military service (paras. 132.94–132.106). Moreover, in its concluding observations on the fourth periodic report of the Republic of Korea, the Human Rights Committee expressed concern that conscientious objectors continue to be subjected to criminal punishment. The Committee stated that persons detained for refusing to perform military service should be immediately released and compensated, and that their criminal records should be expunged (see CCPR/C/KOR/CO/4, paras. 44–45 and 59).

49. In the light of the above analysis, the Working Group urges the Government to uphold the right to conscientious objection to military service in accordance with its obligations under the Covenant. In addition, as the Working Group has previously stated, the duty to comply with international human rights rests not only on the Government but on all officials, including judges, police and security officers, and prison officers with relevant responsibilities.[11] Accordingly, the Working Group urges the national courts of the

[9] See *Hasan and Sarkut v. Turkey* (individual concurring opinion of Committee member Fabian Omar Salvioli, para. 18).

[10] Ibid., paras. 2 and 18.

[11] See, for example, opinions No. 47/2012, para. 22, 64/2011, para. 25, and 16/2011, para. 5.

Republic of Korea, particularly the Supreme Court, to apply the jurisprudence of the Working Group and the Human Rights Committee on conscientious objection to military service by ordering the immediate release and compensation of Mr. Shin and Mr. Baek. This would ensure that they have an effective remedy in accordance with article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

50. The Working Group would welcome the opportunity to engage constructively with the Government on issues relating to the arbitrary deprivation of liberty. The Working Group has held discussions with the Government in relation to conducting a country visit. The Working Group recalls that the Government issued a standing invitation to all thematic special procedure mandate holders on 3 March 2008, and looks forward to a positive response to its request to visit the Republic of Korea.

Disposition

51. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Jeong-in Shin and Seung-hyeon Baek, being in contravention of articles 2, 7, 9 and 18 of the Universal Declaration of Human Rights and of articles 2 (1), 9, 18 (1) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and V.

52. The Working Group requests the Government of the Republic of Korea to take the steps necessary to remedy the situation of Mr. Shin and Mr. Baek without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

53. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Shin and Mr. Baek immediately, to accord them an enforceable right to compensation and other reparations, in accordance with international law, and to expunge their criminal records.

54. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Shin and Mr. Baek and to take appropriate measures against those responsible for the violation of their rights.

55. The Working Group requests the Government to bring its laws, particularly the Military Service Act, into conformity with the recommendations made in the present opinion and with the commitments made by the Republic of Korea under international human rights law.

56. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on freedom of religion or belief, for appropriate action.

57. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

58. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Shin and Mr. Baek have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Shin and Mr. Baek;

(c) Whether an investigation has been conducted into the violation of Mr. Shin's and Mr. Baek's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Republic of Korea with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

59. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

60. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

61. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[5]

[*Adopted on 20 August 2018*]

[5] See Human Rights Council resolution 33/30, paras. 3 and 7.